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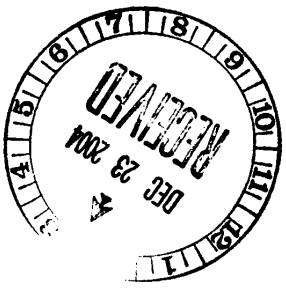

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *Railroad Ventures, Inc. -- Abandonment Exemption Between Youngstown, Ohio And Darlington, PA in Mahoning and Columbiana Counties, Ohio and Beaver County, PA -- STB Docket No. AB-556 (Sub No. 2X)*

Dear Secretary Williams:

Enclosed for filing are an original and 10 copies of a "Joint Petition For Stay" in the above-referenced case. Copies have been served as stated in the Certificate of Service.

Two copies of the above-mentioned document are enclosed, which we request be date stamped and returned to the undersigned. Thank you for your assistance in this matter.

Very truly yours,

Richard H. Streeter

Enclosures

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Before the
SURFACE TRANSPORTATION BOARD

Docket No. AB-556 (Sub No. 2X)

RAILROAD VENTURES, INC.-ABANDONMENT EXEMPTION
BETWEEN YOUNGSTOWN, OHIO AND DARLINGTON, PA
IN MAHONING AND COLUMBIANA COUNTIES, OHIO
AND BEAVER COUNTY, PA

JOINT PETITION FOR STAY

Come now CCPA and CCPR ("Petitioners"), by and through their counsel of record, and respectfully request the Board to stay the effective date of its December 13, 2004 Decision pending resolution of the "Joint Petition For Reopening And Reconsideration" that will be filed forthwith. If not stayed, the decision will become effective on January 12, 2005, and would require CCPA to pay Railroad Ventures, Inc. ("RVI") $217,282, plus interest. For all the reasons set forth below, payment of any amount to RVI would be contrary to the public interest, would cause irreparable harm to CCPA, and would retroactively repudiate the earlier decisions of the Board which were designed to ensure that RVI would be held accountable for all repairs to the line of railroad, necessitated by RVI's failure to keep the line operational, including the Board's November 7, 2001 Decision ("*November 2001* Decision which ordered CCPA to take charge of the escrowed funds. clearly, the Board's Decision of December 13, 2004 ("*December 2004* Decision") would retroactively and substantially alter the controlling Ordering Paragraphs of its *November 2001* Decision and also undermine the Board's earlier intent that has been repeatedly upheld on judicial review. *See Railroad Ventures, Inc. v. S.T.B.*, 299 F.3d 523 (6th Cir. 2002).

INTRODUCTION

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of a stay.

1) There is a strong likelihood that movants will prevail on the merits.

The "refund" payment ordered by the Board would cover four categories of costs. The first group includes the cost of repairs to a crossing at Old Route 51 and a crossing at Cannelton Road. Although the Board did not mention it in its Decision, these two crossings were the subject of a formal Complaint brought by the Department of Transportation of the Commonwealth of Pennsylvania against RVI for allowing the two crossings to deteriorate to the point where they created a safety hazard. Had it not been for CCPA and CCPR taking action to undertake the repairs, the crossings would have been suspended by the Pennsylvania Department of Transportation and rail service could not have been restored to the shippers at Darlington, Pennsylvania. When CCPA acquired ownership of the line and CCPR assumed responsibility for operations, these crossing had been suspended and the rails had been removed and the crossings paved over in order to address the safety hazard created by RVI's failure to maintain the crossings.

Given that background, it is unconscionable for the Board to require CCPA to pay RVI an amount that is equivalent to the amount that was expended to address the problems created by RVI, especially when the Board's decision is grounded on unwarranted speculation that will not withstand close scrutiny. Apparently, CCPA is being punished because there is some suspicion that CCPR did not obtain bids before it contracted with Ohio Track, an unaffiliated entity, to repair the two crossings.

However, as a review of the Ordering Paragraphs in the *November 2001* Decision conclusively demonstrates, ***the Board did not impose a mandatory competitive bidding requirement as a prerequisite to reimbursement for repairs made necessary by RVI's actions and inattention.*** Hence, the Board is in error when it now claims (slip op. at 9 and 11) that it imposed a competitive bidding requirement on CCPA in the *November 2001* Decision. ***No such requirement can be found in the November 2001 Decision.***

As a careful review of the Ordering Paragraphs of the *November 2001* Decision will prove, CCPA was not directed or ordered to obtain competitive bids. As a result, CCPA had no reason to understand that a competitive bid would later be deemed a mandatory condition precedent to the release of funds from the custody account that the Board created in its *November 2001* Decision. The two key Ordering Paragraphs of that Decision that are relevant are paragraphs 6 and 8. *See November 2001* Decision at p. 8.

As herein relevant, Ordering Paragraph 6 states that:

> CCPA may withdraw from the escrow account such funds as are necessary to pay for repairs of this rail line at road crossings and the restoration of signaling equipment that occurred as a result of RVI's failure to keep the line of railroad operational, and shall keep account of all funds spent.

In addition, Ordering Paragraph 8 states that:

> CCPA shall be held harmless for any funds spent from the escrow account for repairs to its line that were the result of RVI's failure to keep the line operational during its ownership of the line, except for any fraudulent expenditures.

There is nothing in either of these, or any of the Board's other Ordering Paragraphs, that required CCPR or CCPA to obtain competitive bids before making any urgently required repairs to the line! Furthermore, there is no intimation that payments for necessary repairs would be disallowed after the fact if there was no competitive bidding. Nor is

there any suggestion that the failure to obtain competitive bids would be considered tantamount to fraud. Therefore, CCPA had no reason to insist that CCPR demonstrate that it had or had not received a competitive bid before it contracted with Ohio Track to do the work at these two crossings or at any other crossings.

Even if it is assumed that the Board intended to include an explicit directive that all future repairs would have to be the subject of competitive bidding that is not sufficient to hold CCPA accountable for CCPR's alleged failure to obtain competitive bids. As the D.C. Circuit explained in *McElroy Electronics Corporation v. F.C.C.*, 990 F.2d 1351, 1353 (D.C. Cir. 1993):

> An agency cannot ignore its primary obligation to state its directives in plain and comprehensible English. When it does not live up to this obligation, we will not bind a party by what the agency intended, but failed to communicate.

It is respectfully submitted that the foregoing principle applies to the unarticulated "directive" that CCPA require competitive bidding in order to be reimbursed for repairs made necessary by RVI. Plainly, because it failed to include a specific requirement that CCPA require competitive bidding, the Board may not retroactively impose such a requirement in order to bind CCPA to an unspoken requirement.

Second, even if the competitive bid issue were relevant, which it is not, the Board's decision appears to be based on speculation that certain bids were contrived. At page 11, the statement is made that:

> it seems that for two crossing-repair projects that were paid out of the Fund after the November 2001 Decision--Old Route 51 (invoiced for $36,720) and Cannellton Road (invoiced for $32,400)--documents were contrived to give the appearance that CCPR had solicited competitive bids in advance when in fact such bids had not been submitted.

After noting that the bids received from Arkansas Shortlines' subsidiaries post-dated the Ohio Track invoice, the statement is made that "the purported competing bids came from an

affiliate of CCPR raises suspicion, as CCPR would have been aware of Ohio Track's fee for the work and could have instructed D&R how high to make a bid so that CCPR could justify use of Ohio Track for the work." It is respectfully submitted that the foregoing speculation is illogical at best.

Clearly, it is counterintuitive for CCPR to have its corporate affiliate "overbid" Ohio Track for the work. At the time, CCPR was looking for work that it could give to the crews of its corporate affiliate, which were underemployed. Hence, it would have been in its corporate best interest to make sure that its affiliate got the work, even if it would have resulted in less profit being realized than Ohio Track might have realized. If it intended to game the situation, CCPR would have directed its affiliate to *underbid* Ohio Track in order to keep the funds within the corporate family. It would have been irrational to "allow" Ohio Track to capture the bid by directing D&R to overbid the job so that "CCPR could justify use of Ohio Track for the work." *Id.* at 12. Indeed, in most instances, knowledge of a competitor's bid is used to undercut the competitor, not to "give away" work in which the party is interested.

In the final analysis, because competitive bids were not ordered, the entire discussion of whether the bids were contrived is irrelevant. Therefore, even if it were to be assumed *arguendo* that CCPR did not obtain competitive bids before it awarded a contract to Ohio Track, that failure is not controlling in the absence of an explicit order or directive that CCPA and CCPR obtain competitive bids before making repairs.[1]

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[1] Although the Board has questioned the veracity of Mr. Gane's original testimony that he was aware of D&R's bids before the work was awarded to Ohio Track, further investigation has shown that the Board's concerns are unwarranted. In their Petition for Rehearing and Reconsideration, Petitioners will demonstrate, based on newly discovered evidence, that the Board was not misled. Based on conversations with Steve Hames, who was the author of the D&R's letter but who is no longer employed by that firm, the bids that he submitted were intended to get the work from Ohio Track. As he will confirm, he vigorously bid against Ohio Track because he would have earned a bonus had he been the low bidder. Thus, it was in his best interest to do so. Under no circumstances would he have had any incentive to overbid the work and lose his potential bonus.

Ultimately, the Board's recent decision does nothing more than unjustly reward RVI, which was solely responsible for allowing the track at the two crossings to deteriorate to the point that the track created a dangerous and unsafe condition that CCPR was required to correct. Had it not agreed to repair the crossings, the Commonwealth of Pennsylvania would have suspended the crossings and prevented rail service from being reinstated. This created an emergency situation that required immediate action. For this reason alone, the Board should reverse its decision with respect to the two crossings.

Furthermore, the Board's *December 2004* Decision ignores the fact that its *November 2001* Decision explicitly ordered that "CCPA shall be held harmless for any funds spent from the escrow account for repairs to its line that were the result of RVI's failure to keep the line operational during its ownership of the line, **except for any fraudulent expenditures.**" The Board may not retroactively impose a different standard and, in the absence of fraud, hold CCPA liable for funds that were spent from the escrow account for repairs to the line. In this case, there is not a scintilla of evidence to support a finding of fraud. Therefore, the Board erred when it ordered CCPA to repay funds to RVI for repairs that were made that were the result of RVI's failure to keep the line operational.[2]

The same reasoning applies with equal force to the administrative overhead that the Board has disallowed because "we find no support in the record for Mr. Robins calculation of the employee salaries and benefits." Once again, the Board is retroactively altering its prior requirements on a retroactive basis.

Counsel also note that they are in the process of trying to confirm with the Pennsylvania PUC when Highway 51 was closed so that the repairs could be done. Such information will be provided in the Petition for Reopening and Reconsideration.

[2] The Board's attention is invited to the Orders of the Pennsylvania PUC which squarely hold that because RVIfailed to maintain the Route 51 and Cannelton crossings those crossings were suspended and paved over at the expense of the Commonwealth of Pennsylvania.

The Board did not require CCPA to demand copies of each and every invoice, time slip or receipt that CCPR would have generated or received. Nor did the Board require CCPA to conduct an exhaustive audit in which CCPR would have had to have submitted the underlying workforce accounting documents such as billing sheets and time logs, receipts for vehicle and travel expenses or records of consulting services in order to receive payment.

As the Board correctly recognized in its *December 2004* Decision, [o]verhead expenses are an essential component of the cost of repairs, and it is standard industry practice for rairoad contractors to incorporate such costs into their service fees." What is not standard practice is the requirement that a party submit documentation in the form of receipts for vehicle and travel expenses, billing sheets, time logs, as well as canceled checks and pay stubs to support allocation of employee salaries and benefits. Simply stated, if the Board were to require submission of this type of documentation in every case, it would be inundated with paper, which is precisely the reason that it has never done so in the past. Given the imposition of this new evidentiary standard, the Board should stay the effective date of its *December 2004* Decision and provide CCPR with the opportunity to deal with this new and unexpected evidentiary requirement.

While if the Board's *November 2001* Decision required that CCPA "shall keep account of all funds spent," that did not require CCPA to conduct a full scale audit on CCPR before it released funds to cover overhead expenses. Nor did it require CCPA to disallow overhead that was attributed to critical repairs essential to restoration of responsive service that should have been paid from the escrow account but were instead paid with state or federal funds because RVI was able to delay, and substantially disrupt implementation of the system that the Board established. Once again, by disallowing administrative overhead for repair projects that were

paid for with federal or state funds, the Board has arbitrarily undercut its original rationale for imposing the requirement of an escrow account.[3]

2) Movant CCPA will suffer irreparable harm contrary to the public interest.

The impact of the Board's decision is not only contrary to the public interest in that it will unjustly reward the entity that has willfully violated the law, but it will cause irreparable harm to CCPA, thereby punishing the one party that has acted in the public interest by taking steps to restore needed rail service.[4] Simply stated, CCPA does not have the funds available that would allow it to comply with the Board's requirement that it pay RVI $217,282, together with interest, on January 12, 2005. Even if it did have funds available, the payment RVI would prevent CCPA from funding other projects that are in the public interest.

The unjust nature of the Board's *December 2004* Decision cannot be overstated. First, that Decision stands to irreparably harm CCPA even though CCPA acted in accordance with the explicit instructions that were given it by the Board in the Ordering Paragraphs of its *November 2001* Decision. Furthermore, when it released funds, CCPA relied on the advice of its counsel and accountants to ensure that its payments would comply with the terms and conditions imposed by the Board.

Second, because the Board clearly articulated a "hold harmless" standard that would be applied to CCPA if it agreed to act as the custodian of the escrowed funds, the retroactive

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[3] In their Petition for Rehearing and Reconsideration, Petitioners will submit further documentary evidence to support their claim that the funds were properly expended consistent with the Board's explicit Ordering Paragraphs in its *November 2001* Decision.

[4] Due in substantial measure to the expenses that were incurred as a result of RVI's obstructionist tactics while it was trying to rehabilitate the line, CCPR was forced to declare bankruptcy in July of this year. As a result, assuming *arguendo* that CCPR was required to obtain competitive bids and failed to do so, which is not the case, CCPR would not suffer any financial harm as a result of the Board's Decision. Given CCPR's bankrupt status, the impact of the Board's decision will fall solely on CCPA, which the Board previously ordered "shall be held harmless." This result is not only erroneous as a matter of the law of the case, but it arbitrarily punishes a quasi-governmental entity that has acted in good faith throughout this protracted dispute by dispersing funds consistent with the standards initially established by the Board in its *November 2001* Decision.

modification of that standard is unconscionable. Plainly, the Board's decision to hold CCPA liable for not seeking backup documentation and not requiring competitive bidding flatly contradicts the fraud standard that it established in its *November 2001 Decision*. *See* Ordering Paragraphs 6 and 8, *November 2001* Decision, slip op. at 8.

CCPA understood and took at face value the Board's protective condition that "CCPA *shall* be held harmless ... except for any fraudulent expenditures" (emphasis added). Because the Board thereafter never modified the fraud condition, CCPA released funds from the account only after satisfying itself that the expenditures were consistent with the Board's description of repairs that were subject to the escrow payments. Had CCPA realized that the Board would years later retroactively alter the standard that governed disbursements from the account, it would have again urged the Board to instead adopt the procedure CCPA specifically proposed for handling project approval and disbursement of funds. Most certainly, it would have declined to act as the custodian of the funds and insisted that ORDC be appointed as the new custodial agent.

Having relied on the Board's specifically articulated orders, as well as the advice of counsel, CCPA should not be subjected to unforeseen consequences of failing to comply with unarticulated requirements. In this case, a fair reading of the Board's *November 2001* Decision compels the conclusion that CCPA has been blindsided by the Board's retroactive imposition of previously unspecified requirements.

Furthermore, irreparable harm may also be attributed to the Board's action in rejecting the procedure suggested by CCPA that would have allowed the Board to resolve disputes as they occurred. As the Board noted at page 6 of the *November 2001*t Decision:

> In view of the disagreement on coverage for repair sites, CCPA has asked us establish a procedure affording RVI a time to

> identify any specific repair or restoration projects it considers not to be covered by the escrow provision and affording CCPA additional time to respond. Under CCPA's suggestion, we would then decide whether a particular repair is covered by the escrowed funds, and, if it is, we would then order a newly appointed escrow agent to disburse the funds to CCPA.

Given the Board's prior decision to deny CCPA's request for an order establishing explicit procedures for RVI to challenge whether certain repairs may be paid from the escrowed funds, it is arbitrary and capricious for the Board to fault CCPA retroactively for not anticipating that the Board would require submission of the backup documentation to support the calculations made by Tim Robbins with respect to administrative overhead costs. If the Board intended that CCPA audit CCPR's requests for payment of expenditures and overhead, it should have imposed an explicit requirement to that effect. It did not do so. Having failed to do so at the outset, the Board may not do so at this point in time where there is no dispute that the funds were disbursed to cover the cost of urgently required repairs and where the payment of funds to RVI will cause unjust enrichment and irreparable harm to public body that was acting in the public interest.

3) RVI Will Not Suffer Any Harm If The Effective Date Of The Decision Is Stayed.

At most, RVI would be prevented from seeking the immediate enforcement of the Board's decision if the effective date were to be stayed. Even if the Board were ultimately to affirm its *December 2004* Decision, RVI would still be able to collect interest for the time that it would otherwise by received the funds that CCPA has been ordered to pay to it.

4) The Public Interest Would Be Served By A Stay In Order To Prevent Irreparable Harm To CCPA.

When it modified the escrow fund in its *November 2001* Decision, the Board did so because "RVI's position and actions regarding the escrow account have not furthered [the goals

of rebuilding the line], but rather have frustrated the orderly administration of these funds and have prevented disbursement of funds from the account for legitimate expenditures that were meant to be covered by the fund." *November 2001 Decision,* slip op. at 7. Plainly, if it were not for RVI's actions in delaying the initial release of escrowed funds, **repair projects that were ultimately funded by the Ohio Rail Development Commission and by CCPA would have been paid for by the funds that were escrowed for that very purpose.** As a result, despite its past awareness that RVI's actions resulted in public funds being used to pay for repairs that the Board intended RVI to pay, the *December 2004 Decision*, if not reversed, would unjustly and retroactively reward RVI by compelling CCPA and the taxpayers to pay a second time for RVI's malfeasance.

In this respect, it should be noted that CCPA was the original source of the escrowed funds. If after expending funds to pay for urgently required repairs it is now required to pay RVI the amount that was spent on the repairs, CCPA would face double jeopardy. Most importantly, it would end up bearing the financial burden that the Board imposed on RVI with the solid support of the United States Court of Appeals for the Sixth Circuit, which squarely endorsed the escrow account. *Railroad Ventures, Inc. v. S.T.B., supra,* 299 F.3d at 560 ("Considering RVI's conduct since acquiring the rail line, the STB, quite wisely, required an escrow of funds to repair the damage to the track done with RVI's authorization.")

CONCLUSION

For all the above-stated reasons, the Board should stay the effective date of its *December 2004* Decision. Not only is there a strong likelihood that Petitioners would prevail if required to seek judicial review, but CCPA, which has acted in good faith throughout this protracted litigation, would suffer irreparable injury if required to pay RVI the sum of $217,282 by January

12, 2005. More over, RVI cannot demonstrate that it would suffer any injury if it were somehow to prevail. Finally, it is unconscionable to require CCPA to pay RVI any amount that was spent on repairs that were necessitated by RVI's unlawful behavior.

Respectfully submitted,

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Date: December 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of December, 2004, served a true copy of the foregoing Petition for Stay upon the following by Federal Express and by e-mail:

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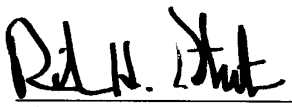

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